STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge
Case No. 15-ALJ-15-0046-AP

APPELLATE CASE No.: 2016-000296

KENNETH GREEN, #116020

RESPONDENT.

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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1. **Did the Court err in deciding that the Board's decision not to ratify the previous Board's decision was arbitrary and capricious?**

STATEMENT OF THE CASE

On November 29, 2000, the Appellant appeared before the Parole Board and was denied parole with a vote of four (4) to two (2). Prior to the South Carolina Supreme Court's decision in 2013 in the case of Barton v. S.C. Department of Probation, Parole and Pardon Services, 404 SC 395, 745 S.E. 2d 110 (2013) the Parole Board required violent offenders to receive a vote of five (5) Board members to be granted parole.

After the Barton decision, the Department developed a procedure to review previous cases to determine if they qualified for release under Barton. (South Carolina Board of Paroles and Pardon, Operations manual, January, 2014)

Pursuant to that procedure, the Office of Parole Support Services would verify that the offender received the proper number of votes and the Office of Legal Services would verify that it qualified under Barton. The Board would then ratify the vote and impose any conditions that it felt necessary. A special order of Parole would be signed by the Board.

The Board met on July 22, 2015 and decided not to ratify the Appellant's vote and notified the Appellant that he would again be heard and considered for parole on or about March 11, 2016.

This matter was appealed to the Administrative Law court filed on August 21, 2015. The Administrative Law Court issued its opinion on February 11, 2016. The Appellant appealed that decision to the Court of Appeals.

The issues presented to the Administrative Law Court were:

1. **That the only evidence before the Parole Board was that the Appellant received four (4) votes on November 29, 2000 in favor of parole. That there is no evidence to support the Board's decision not to ratify the vote of 2000.**

2. **That the Parole Board violated policy by its failure to ratify the previous Board's vote of November 29, 2000 and by taking additional testimony of the victim opposition on July 22, 2015.**

STATEMENT OF THE FACTS

Respondent is serving a life sentence for murder. He received this sentence in 1983 in Dorchester County. He was sentenced to life imprisonment with a twenty (20) year parole eligibility. He has currently served thirty three (33) years on this sentence. He has received three (3) disciplinaries in the thirty three (33) years of incarceration.

On November 29, 2000, the Respondent went up for parole. There were six (6) member of the Parole Board present at the time of the vote. He received a vote of four (4) to two (2) and his parole was rejected. The vote count was not designated as four (4) in favor or four (4) against.

Pursuant to the South Carolina Supreme Court's decision in Barton, the Respondent had to receive a simple majority or a simple majority of the members present. Prior to Barton, Respondent would have needed to obtain five (5) votes to be granted parole.

The Respondent received and submitted sworn Affidavits of three prior members of the Parole Board (ROA pp. 2-7). These prior members stated under oath that they voted in favor of release of the Respondent. One member, Mrs. Marlene McClain remembered that an additional member, Mr. Hodges (now deceased) voted in favor of release (ROA pp 3-4). This makes four (4) votes in favor of release.

By letter dated July 22, 2015, the Board voted not to ratify the previous vote.

ARGUMENT

Did the Court err in deciding that the Board's decision not to ratify the Previous Board's decision was arbitrary and capricious?

The Lower Court's decision provides a step by step analysis of the issues now before this Court.

First the Lower Court found that in Barton, the South Carolina Supreme Court held that the version of §24-21-645 existing at the time of an inmate's offense is what is applicable at an inmate's parole hearing.

Following the Barton decision, the Department began holding Barton hearings. The purpose of these hearings as set forth on page 35, Section 10 of the Department's January, 2014 Operations Manual is to determine whether an inmate received the proper number of votes pursuant to Barton.

In this case, the 1984 version of §24-21-645 was the law at the time of Respondent's offense and predates the Omnibus Criminal Justice Improvement Act of 1986. Thus the Respondent is only required to receive a simple majority of the Board.

In this case, the Respondent provided Affidavits from Bishop Sanco Rembert (ROA p. 2), Marlene T. McClain (ROA p. 3-4) and June Shissias (ROA p. 5) all of whom were Board members at the November 29, 2000 hearing. These members attest that they voted in favor of Respondent's parole. Ms. McClain also attests to the fact that J.P. Hodges, who has since died, also voted in favor of the Respondent being granted parole.

The Court noted that both Rembert and Shissias attested to the fact that they listened to the recording of the November 29, 2000 hearing which refreshed their recollection that they voted in favor of the Respondent being granted parole. Rembert

and Shissias also specifically explained that the Board had a tradition at that time of taking the yes votes first.

The Lower Court then found that there is nothing in the record that suggests that the Affidavits are not credible.

The Court concluded by stating that:

> "I find that there was uncontradicted evidence in the record to support the prior Board's finding of four favorable votes, and that number was the required number of favorable votes for parole, I find that the current Board's decision not to ratify the previous Board's four-to-two decision contradicted its own policy and was therefore arbitrary." (ROA p. 17)
>
> "if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the parole hearings happened years ago, then the Barton hearings would have no meaning, instead being subject to the whim and caprice of the Board." (ROA p. 17)

The Appellant argues in their brief:

a) That the decision to grant parole is left totally up to the Board and "if the Board decides the affidavits were in error, or the prior Board members were mistaken, they have the right not to accept the evidence."

b) That the Administrative Law Court came to the conclusion that the Board in their rejection made this decision solely on the affidavits submitted. "However, this is not the only information the Board used in making this decision... The matter of prior and subsequent hearings must be considered while the Board is making a determination there were sufficient votes given to the Respondent."

c) That the Board's Procedural Policy for Barton hearings gives the Board the authority to accept or deny the request of the Respondent for parole.

Clearly these arguments are inconsistent with the Supreme Court's ruling in Barton and the Department's own established policy.

To quote the Lower Court "if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the Parole hearings happened years ago, then the Barton hearing would have no meaning." (ROA p. 17) The Respondent would go further to argue that this line of thought would render the Barton decision itself without meaning.

Pursuant to the Operations Manual of the South Carolina Board of Paroles and Pardons the Board may convene a Barton hearing. At that hearing the Board may impose any conditions on the offender as it feels necessary. The policy goes further to state that the Board **will** (emphasis added) then sign a special Barton order of parole which ratifies the votes of the previous Board members which would have granted conditional parole.

It is arguable that the operations manual does not provide for or allow the Board to determine the validity of the votes. The Policy states that the office of Parole Support Services staff will investigate to verify that the offender received the proper number of votes and the Department's office of Legal Services will verify that it qualifies under Barton. At that point, the case is sent to the Board for ratification and any conditions of Parole may be imposed.

In addition, the Board may not go back to consider prior or subsequent hearings. This clearly defeats the holding in Barton and transforms the Barton hearing into an ordinary parole hearing, which is directly contrary to Barton and the Board's own procedural policy.

An arbitrary and capricious agency decision "is without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules of principles." Timmier v. S.C. Dep't of Labor, Licensing & Regulation, 405 S.C. 239, 246, 746 S.E. 2d 491, 495 (Ct. App. 2013) (quoting Deese v. S.C. State Board of Dentistry, 286 S.C. 182, 184-85, 332 S.E. 2d 539, 541 (Ct. App. 1985)). An agency decision is an abuse of discretion when the decision is based upon a factual conclusion that is without evidentiary support. Trident Med. Ctr. v. S.C. Department of Health & Envtl. Control, 412 S.C. 341, 348, 772 S.E. 2d 177, 181 (Ct. App. 2015). Clearly the Board's decision was arbitrary and capricious.

The Appellant argues that the ALC's decision should be reversed because the ALC "made itself the determining body regarding parole" thereby usurping the authority given the Parole Board by the General Assembly. The Appellant's argument should be rejected as it mischaracterizes the ALC's decision.

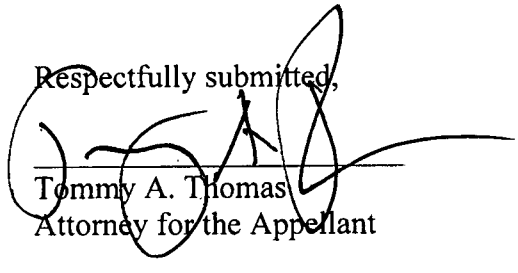
The Lower Court did not review the Respondent's record while in prison and determine whether he should receive parole. That determination was made by the Board on November 29, 2000. The Lower Court also did not review and reverse a routine denial of parole by the Parole Board, as such a ruling would be contrary to the well-established law that parole is a privilege, not a right. Cooper v. South Carolina Department of Probation, Parole and Pardon Service, 377 S.C. 489, 496, 661 S.E. 2d 106, 110 (2008). The Lower Court reversed the Board's decision because the evidence clearly supports the fact that the Respondent received the necessary votes to be granted parole under Barton.

The Lower Court remanded the Respondent's matter to the Parole Board so that Respondent could proceed to step two in the parole process where Respondent would receive any parole conditions. In short, the ALC ordered Appellant to follow its own policy.

CONCLUSION

That based upon the forgoing reasons, the Court should affirm the decision of the Administrative Law Court.

Respectfully submitted,



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June 13, 2016

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Attorney for Respondent certify that I have served a Final Brief of Respondent and Supplemental Record on Appeal on Tommy Evans, Legal Counsel for the South Carolina Department of Probation, Parole and Pardon Services, by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

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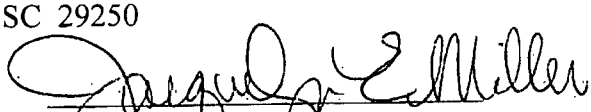

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